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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc., and)
BellSouth Long Distance, Inc., for)
Provision of In-Region, InterLATA)
Services in Louisiana)

CC Docket No. 97-231

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FEDERAL COMMUNICATIONS COMMISSION
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OPPOSITION OF ACSI

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Riley M. Murphy
Executive Vice President
and General Counsel
AMERICAN COMMUNICATIONS
SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701
301-617-4200

Brad E. Mutschelknaus
John J. Heitmann
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.,
Suite 500
Washington, D.C. 20036
202-955-9600

Its Attorneys

November 25, 1997

SUMMARY

As an intended beneficiary of the market-opening incentives created by Section 271, ACSI has a direct stake in the outcome of BellSouth's Application. ACSI is a facilities-based CLEC which has been rapidly deploying local fiber optic networks across southern and southwestern United States. The Company already has constructed local fiber networks in eight of the nine BellSouth states, and has installed local exchange switches in four of BellSouth's local markets. However, the ultimate success of ACSI's foray into the local switched services market depends largely on BellSouth's willingness to interconnect effectively and compete fairly. Since neither of these conditions yet exists, BellSouth's Application must be denied. Without the incentive given to BellSouth by the prospect of interLATA entry, local exchange competition in Louisiana will be delayed indefinitely.

BellSouth's Application to initiate in-region interLATA services in Louisiana is simply premature. Congress' instruction is explicit: reentry under "Track A" can occur only after a CLEC in that state begins serving both business *and* residential subscribers predominantly over their own network facilities. As BellSouth admits, while ACSI and other *wireline* CLECs are deploying local exchange facilities at a fervent pace, none yet are able to serve residential subscribers over their own facilities. Nevertheless, anxious to jump the gun on Section 271 reentry, BellSouth points to the limited residential services offered by several PCS providers as evidence of the facilities-based residential competition needed to clear the way for BOC reentry. But BellSouth's pretextual approach must be rejected, as Congress' clearly intended that wireline competition be in place prior to Bell reentry, and specifically

excluded wireless services from the Section 271 competition analysis. BellSouth's approach can be credited with being innovative, but it is equally wrong.

Even if BellSouth could be heard under Track A, its Application should be denied because it has not implemented critical components of the Section 271 "competitive checklist". ACSI has been ordering unbundled local loops and associated facilities from BellSouth for over a year. In ACSI's direct experience, BellSouth continues to be either unable or unwilling to provide unbundled local loops reliably. Due to inadequate OSS, inadequate training, and a simple lack of effort, BellSouth has yet to develop the systems required to install unbundled network elements and resale services at parity with the service levels provided to its own end users. As BellSouth's own auditors have confirmed, BellSouth's provisioning of unbundled network elements and local resale services remains a "hit or miss" proposition at best.

Finally, approval of BellSouth's premature Application simply is not in the public interest. Throughout its service territory, BellSouth has been quick to sign local interconnection agreements and exceedingly slow to implement them. In fact, the signing of an interconnection agreement often serves only to trigger BellSouth's efforts to employ various anticompetitive sales strategies and tactics. Once its Section 271 application is approved, the Commission will lose its most formidable lever for ensuring that BellSouth cooperates in opening the local market in Louisiana to competition. For these reasons, ACSI respectfully submits that BellSouth's Application is grossly premature, and should be denied.

TABLE OF CONTENTS

INTRODUCTION	2
A. ACSI Is a Facilities-Based Competitor in Louisiana	2
B. BellSouth's Application Should Be Dismissed or Denied	5
I. BELLSOUTH'S APPLICATION SHOULD BE DISMISSED BECAUSE IT IGNORES THE FCC'S ROADMAP	6
II. BELLSOUTH'S RELIANCE UPON ITS AGREEMENTS WITH PCS PROVIDERS FOR SATISFACTION OF SECTION 271(c)(1)(A) IS MISPLACED	7
III. BELLSOUTH'S UNE PRICING IS AT ODDS WITH REQUIREMENTS OF THE ACT AND THE COMMISSION'S ROADMAP	12
A. BellSouth's UNE Rates for Louisiana are Not Cost-Based	12
B. BellSouth Refuses Offer Geographically-Deaveraged UNE Rates in Accordance with the FCC's Roadmap	15
C. BellSouth's Non-Recurring Costs Create a Barrier to Entry	16
D. BellSouth's Creation of a Residential Cost-Price Squeeze Is Forestalling the Development of Facilities-Based Residential Service Competition	18
IV. BELLSOUTH'S APPLICATION SHOULD BE DENIED BECAUSE IT HAS NOT FULLY IMPLEMENTED THE COMPETITIVE CHECKLIST	20
A. BellSouth Is Unable or Unwilling to Provision ULLs and INP as Required by the Act	23
B. BellSouth Has Failed to Provide Local Exchange Services for Resale or Access to Telephone Numbers in Accordance with the Act	32
C. BellSouth's OSS Is Deficient and Underdeveloped	35
D. The Service Quality Problems Experienced by ACSI Are the Direct Result of BellSouth's Failure to Deploy Adequate Resources	37
E. BellSouth's Refusal to Pay Reciprocal Compensation for ISP Traffic Retards Competition for Local Internet Access	44
F. BellSouth is Unable to Provide Collocation and Interconnection in Accordance with the Act	45

TABLE OF CONTENTS (Cont'd)

V.	BELLSOUTH HAS REFUSED TO ADOPT PERFORMANCE MEASUREMENTS NECESSARY TO DETERMINE COMPLIANCE WITH THE ACT	46
VI.	BELLSOUTH'S PREMATURE ENTRY INTO THE LOUISIANA INTERLATA MARKET IS NOT IN THE PUBLIC INTEREST	49
	CONCLUSION	56

INDEX OF ACSI APPENDIX

Tab	Description	
Exhibit	Document	Subject
1	<i>Initial Brief of ACSI, FCC File No. E-97-09 (public version)</i>	BellSouth's failures in providing UNEs, INP and interconnection to ACSI in Georgia
2	<i>Reply Brief of ACSI, FCC File No. E-97-09 (public version)</i>	BellSouth's failures in providing UNEs, INP and interconnection to ACSI in Georgia
3	<i>Complaint of American Communication Services of Columbus, Inc. Against BellSouth Telecommunications, Inc. Regarding Access to Unbundled Loops, Georgia PSC Docket No. 7818-U</i>	BellSouth's failures in providing ULLs in Georgia
4	<i>Analysis Conducted for BellSouth - LCSC ("Independent Audit")</i>	Results of an independent audit of BellSouth's Birmingham and Atlanta LCSCs
5	<i>Post-Audit Reports</i>	Reports on implementation of plan to address shortcomings of BellSouth's LCSCs

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CC Docket No. 97-231

To: The Commission

OPPOSITION OF ACSI

American Communications Services, Inc. and its Louisiana operating subsidiaries, (collectively, "ACSI" or the "Company"), by their attorneys, respectfully submit the following opposition to the Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively, "BellSouth")¹ for authority to provide in-region, interLATA services in Louisiana pursuant to Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). As explained below, ACSI believes that BellSouth's Application is grossly premature and must be dismissed or denied.

¹ *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA services in Louisiana, CC Docket No. 97-231, Brief In Support of Application* (Nov. 6, 1997) (hereinafter, "*BellSouth Brief*").

INTRODUCTION

A. ACSI Is a Facilities-Based Competitor in Louisiana

With many of its markets situated in BellSouth's service territory, ACSI has an acute interest in the irreversible opening of BellSouth's local exchange markets to competition. ACSI currently competes with BellSouth in local markets in every state but one in its service territory.² Within this territory, ACSI provides a broad array of advanced telecommunications services including data services and dedicated local services to businesses, and local switched voice services to business and residential customers.³ ACSI's facilities-based entry strategy is based on supplying customers with advanced telecommunications services through the use of ULLs in combination with its own collocated equipment and digital SONET-based fiber optic local networks. As of November 6, 1997, ACSI had completed construction of local fiber networks in 32 markets and had nine local exchange switches in operation, including one in New Orleans. ACSI plans to complete installation of seven more local exchange switches by year end.

² Although ACSI provides certain data transmission facilities in North Carolina, it has not yet deployed facilities there for transmission of basic telecommunications services. ACSI has constructed its own local network facilities in every other BellSouth state.

³ As explained below, due to BellSouth's pricing of unbundled local loops ("ULLs"), ACSI's provisioning of services to residential end-users currently is limited to circumstances where it provides service to multi-tenant dwelling units ("MDUs") and shared tenant services ("STS") providers that, in turn, connect residential customers to ACSI's switched local service offerings.

ACSI and BellSouth signed a partial agreement providing for local interconnection and access to unbundled network elements ("UNEs"), including ULLs, on July 25, 1996.⁴ However, since the parties were unable to agree on several important issues — including the pricing of ULLs⁵ — ACSI petitioned for state commission arbitration of the disputed points in Louisiana and seven other BellSouth states. ACSI believed that the absolute rate levels quoted by BellSouth for ULLs greatly exceeded cost, and objected strongly to BellSouth's refusal to deaverage ULL rates by geographic zone. On October 17, 1997, before any of these state arbitration proceedings were decided, ACSI and BellSouth agreed to an interim solution of prices subject to "true-ups" pending the outcome of state commissions' generic cost dockets and incorporated it in an amendment to their interconnection agreement.⁶ ACSI agreed to this approach principally to avoid further costly delay in implementing its plans to begin offering facilities-based local switched services across the BellSouth region. Soon thereafter, state commissions across the BellSouth service territory, including the Louisiana Public Service Commission ("LPSC"), approved the ACSI/BellSouth Interconnection

⁴ The ACSI/BellSouth Interconnection Agreement is attached to the *BellSouth Application* at *BellSouth Appendix B, Tab 5* (hereinafter, "*ACSI/BellSouth Interconnection Agreement*").

⁵ As a facilities-based CLEC, the use of BellSouth ULLs to connect to individual end-users is a critical component of ACSI's network implementation and market entry strategy.

⁶ *Amendment to ACSI/BellSouth Interconnection Agreement*, Oct. 17, 1996 (attached to BellSouth's Application at *BellSouth Appendix B, Tab 5*, (hereinafter, "*ACSI/BellSouth Interconnection Agreement Amendment*").

Agreement, as amended. To complement its facilities-based/UNE entry strategy, ACSI also sought and entered into a regional local resale agreement with BellSouth in December 1996.⁷

With these agreements in place, ACSI entered local markets throughout the South. At considerable expense, ACSI has collocated equipment in BellSouth end offices and purchased ULLs, other UNEs and wholesale services from BellSouth. It first deployed local fiber networks in New Orleans, Baton Rouge and Shreveport to provide dedicated interstate access services. Indeed, numerous office buildings/parks already are "on-net" and "lit" by ACSI in Louisiana, and the number is growing steadily. ACSI received its authority to provide local telecommunications services in Louisiana from the LPSC on March 27, 1997. The Company installed a local exchange switch in New Orleans earlier this year, and is in the process of establishing collocation arrangements in BellSouth central offices to obtain access to BellSouth UNEs.

ACSI currently provides local switched services to hundreds of customers with thousands of lines in Louisiana. Many of these customers are served on a resale basis. Others are connected directly to ACSI's network and facilities. Some even are receiving local switched services through the use of the local exchange switch which ACSI recently installed in New Orleans. However, because BellSouth has inadequately prepared its space at a critical central office in New Orleans, BellSouth currently is unable to satisfy ACSI's request for collocation there. BellSouth's interim collocation solution, which provides ACSI

⁷ ACSI has and will continue to resell BellSouth's services to complement its facilities-based offerings. However, resale is neither ACSI's primary nor its long term focus. Indeed, ACSI believes that resale of local services alone cannot be profitable anywhere in BellSouth's service territory.

with capacity to serve only 10 percent of the lines requested by ACSI in August will delay ACSI's ability to collocate and begin turning up customers on ULLs.

Nevertheless, ACSI currently provides, or actively is implementing plans to provide, a wide range of local telecommunications services in Louisiana, including dedicated and private line, high-speed data services, IP switching and managed services, local switched voice services, and Internet services. As was the case with MCI's entry into long distance, simple economics dictates that ACSI's marketing of local switched services in Louisiana initially will be directed primarily toward business customers. However, as it has done elsewhere in BellSouth's territory, ACSI will welcome profitable opportunities to provide service to MDU and STS locations which may include residential consumers. In addition, ACSI is interested in offering its switched facilities-based local services on a wider scale to residential customers in Louisiana when a deaveraged and truly forward-looking cost-based pricing structure for ULLs and related UNEs is made available.

B. BellSouth's Application Should Be Dismissed or Denied

Because BellSouth makes no case for compliance with the Act and the FCC's ("FCC" or "Commission") roadmap, ACSI submits that the Commission should dismiss BellSouth's Application outright. In the event that the Commission is convinced that there is some value in proceeding further, ACSI submits that the Application should be denied because:

- (1) BellSouth currently is ineligible for entry under either Track A or Track B;
- (2) BellSouth has not demonstrated compliance with the 14-point competitive checklist;

- (3) BellSouth refuses to implement performance measures necessary to determine its compliance with the Act; and
- (4) BellSouth's premature entry into the interLATA market is not in the public interest.

I. BELLSOUTH'S APPLICATION SHOULD BE DISMISSED BECAUSE IT IGNORES THE FCC'S ROADMAP

ACSI respectfully submits that Section 271 applications that make no case for compliance with the Act and the Commission's rules and policies should be rejected outright. This Application presents such a case, as BellSouth (once again) concedes that its submission falls well short of complying with the Act and the Commission's roadmap.⁸

Twice before the Commission has reviewed RBOCs' Section 271 applications in an effort to provide guidance helpful to meeting the Commission's requirements for interLATA entry. Indeed, in its *Ameritech Michigan Order*⁹, the Commission set forth a roadmap with specific requirements and performance measurements for access to OSS and other checklist items. The roadmap also contains guidance as to what the Commission will consider relevant and necessary under its public interest inquiry. Nevertheless, for the second time in little more than a month, BellSouth has filed an Application in which openly flouts portions of the Act and the Commission's roadmap relevant to checklist implementation and performance measurement.

⁸ See, e.g., *BellSouth Application*, at 24-25.

⁹ *In the Matter of Ameritech Michigan Application Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan* CC Docket No. 97-137, *Memorandum Opinion and Order* (rel. Aug. 19, 1997) (hereinafter, "*Ameritech Michigan Order*").

Applications such as these should not be permitted to divert the scarce resources of competitors and the Commission away from activities that may more effectively serve to open markets to local competition (*i.e.*, participation in state commission cost dockets and ruling on complaints). Thus, ACSI submits that the Commission should promptly dismiss this and any future RBOC Section 271 application that fails to make an affirmative case of compliance with the Act and the Commission's roadmap. In addition, ACSI submits that sanction should be imposed for filing such frivolous applications. ACSI respectfully suggests that RBOCs should be barred from reapplying for in-region long distance authority for at least one year if the Commission finds that an applicant knowingly ignored the Commission's prior guidance for making an acceptable submission.

II. BELLSOUTH'S RELIANCE UPON ITS AGREEMENTS WITH PCS PROVIDERS FOR SATISFACTION OF SECTION 271(c)(1)(A) IS MISPLACED

Acknowledging that it cannot yet identify any "Track A" *wireline* carrier which provides residential telephone exchange services, BellSouth mistakenly relies upon its agreements with three *wireless* carriers to demonstrate its qualification under Track A¹⁰ to file for authority to provide interLATA services in Louisiana.¹¹ Specifically, BellSouth contends that three personal communications service ("PCS") carriers — PrimeCo Personal Communications ("PrimeCo"), Sprint Spectrum, and MereTel Communications ("MereTel") — meet each of the four prongs of Track A. Under this four-pronged test, a Track A carrier must:

¹⁰ 47 U.S.C. §271(c)(1)(A).

¹¹ *BellSouth Application*, at 8-9.

- have an approved agreement under Section 252;
- be a competing provider of telephone exchange service under Section 3(47)(A) of the Act;
- serve residential and business subscribers; and
- offer service exclusively or predominantly over its own telephone exchange service facilities.

The crux of BellSouth's argument is that the three named PCS providers provide "telephone exchange service" for purposes of Section 271(c). As BellSouth acknowledges, Section 271(c)(1)(A) expressly excludes services provided by cellular telephone carriers from the definition of "telephone exchange service". However, BellSouth claims that this exclusion, by necessary implication, demonstrates the *inclusion* of PCS carriers, which provide a technically and commercially similar service.¹² BellSouth contends that, in the absence of Congress' express exclusion of cellular service, cellular carriers would necessarily have been included within the scope of Section 271(c)(1)(A). Accordingly, BellSouth concludes that Congress' silence in that same section regarding PCS carriers confirms such providers' inclusion and justifies its reliance upon its arrangements with the three PCS providers to demonstrate satisfaction of the requirements of Section 271(c)(1)(A).

BellSouth's self-serving interpretation of Section 271(c)(1)(A)'s requirements is off the mark. While the Commission indeed has found that PCS and cellular carriers provide telephone exchange service, it has done so pursuant to *Section 3(47)(B)*, not Section

¹² *Id.* at 11.

3(47)(A).¹³ Accordingly, the Commission has never found that CMRS providers offer telephone exchange service within the definition of Section 3(47)(A). Section 271(c)(1)(A) is unequivocal that a Track A carrier must provide telephone exchange service as defined in Section 3(47)(A).

Because Congress excluded cellular carriers from the definition of Section 3(47)(A), BellSouth weakly deduces that cellular — and PCS — providers must in fact fall within the definition of Section 3(47)(A) for purposes of Section 271. Apart from this weak deduction, BellSouth offers no support for concluding that PCS (or cellular) carriers actually meet the elements found in the definition of Section 3(47)(A).

Unfortunately for BellSouth, the more logical interpretation of Section 271(c)(1)(A)'s cellular exclusion does not lead to the result it desires. The fact that Congress, under Section 271(c)(1)(A), required competitors to meet the definition of 3(47)(A) in particular, rather than 3(47) in general, strongly suggests that the Commission should be circumspect in ascertaining whether non-wireline carriers fall within Section 3(47)(A). Indeed, Congress' express exclusion of cellular carriers in the last sentence of Section 271(c)(1)(A) reflects the care that Congress desired the Commission to exercise in evaluating the definition of "telephone exchange service". Because cellular and PCS services are technically and commercially indistinguishable, it follows that, if cellular service is not to be considered "telephone exchange service" for purposes of Section 271(c)(1)(A), neither should PCS.

¹³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1013 (1996) (hereinafter, "*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997).

While BellSouth contends that Congress would have had no need to exclude cellular if cellular did not fall within Section 3(47)(A), that is not the most reasonable interpretation of Section 271(c)(1)(A). Rather, the last sentence of that subsection merely reflects Congress' desire to ensure that cellular services were not defined by the FCC to fall within the Section 3(47)(A) definition. There is no hint that Congress meant thereby to force the Commission to include PCS and other CMRS services. BellSouth simply reads too much into the cellular exclusion.

In fact, the non-existent basis for finding PCS services to be providers of "telephone exchange service" under Section 3(47)(A) for purposes of Section 271(c)(1)(A) is underscored by the legislative history. The sole reference to the cellular exclusion is in the House Report, where it is stated that cellular service was excluded because the Commission had not determined that cellular is a substitute for local telephone service.¹⁴ By the same token, the Commission has not determined that PCS is a substitute for local telephone service.¹⁵ Indeed, despite the fact that Section 332(c)(3) expressly empowers state regulators to apply for jurisdiction over PCS providers where their services "are a substitute for land line telephone exchange service" no carrier or state commission — let alone the LPSC — has yet applied for and received state authority under Section 332(c)(3) to regulate PCS or cellular service as telephone exchange services. Accordingly, for purposes of Section 271(c)(1)(A), PCS, like cellular, should be excluded from the definition of "telephone exchange service" in Section 3(47)(A).

¹⁴ H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 77 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 43 ("H.Rpt.No. 204").

¹⁵ *See* 47 U.S.C. § 332(c)(3).

Moreover, given the recent treatment by the Commission of cellular and PCS service in an identical manner, from a regulatory standpoint,¹⁶ the only way for the Commission to maintain a regulatory balance consistent with the intent of Congress is to exclude PCS from Section 271(c)(1)(A). It is clear from the legislative history that Congress contemplated that the RBOCs would face *wireline* competition before Section 271 authority would be granted. For example, in the Conference Report, the conferees focused on the potential competition from cable companies.¹⁷ Given that A and B Block PCS licenses already had been granted, and auctioning of the C-Block licenses was ongoing at the time of passage of the 1996 Act, the reports accompanying the 1996 Act are conspicuously silent about competition from wireless providers of telephone exchange service meeting Section 271(c)(1)(A) requirements.

In sum, contrary to BellSouth's assertions, agreements with PCS carriers do not satisfy the requirements of Section 271(c)(1)(A) absent a finding that PCS either (i) provides telephone exchange service under 3(47)(A) or (ii) is a substitute for wireline local telephone service in accordance with Section 332(c)(3). BellSouth has made neither showing and its Application must be denied.

¹⁶ See, e.g., *Local Competition Order, Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order 11 FCC Rcd 15499 (1996) (hereinafter, "*Second Local Competition Order*"); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services* CC Docket No. 94-54, 11 FCC Rcd 18455, ¶¶ 17-21 (1996); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, 11 FCC Rcd 18676, ¶¶ 80-84 (1996).

¹⁷ Conf. Rpt. p. 148; see also H.Rpt.No. 204 at 77.

III. BELLSOUTH'S UNE PRICING IS AT ODDS WITH REQUIREMENTS OF THE ACT AND THE COMMISSION'S ROADMAP

A. BellSouth's UNE Rates for Louisiana are Not Cost-Based

Section 271(d) requires the Commission to determine that BellSouth has fully implemented the competitive checklist. The competitive checklist, in turn, requires BellSouth to provide interconnection, access to UNEs, and transport and termination, at prices that are "in accordance with" section 252(d).¹⁸ Section 252(d) provides that rates for interconnection and UNEs must be "based on the cost. . . of providing the interconnection or network element. . . and may include a reasonable profit."¹⁹ Specifically with respect to satisfaction of the Section 271 competitive checklist, the Commission has stated that this requires a BOC to "demonstrate[] that prices. . . are based on forward looking economic costs,"²⁰ and that it will require that such prices "be based on TELRIC principles."²¹

Unfortunately, BellSouth by its own admission, elected to ignore TELRIC pricing principles in proposing interconnection and UNE rates for Louisiana. BellSouth took the position in the Louisiana cost docket that "it should be allowed to recover its actual, or embedded, costs."²² Indeed, BellSouth proposed that it be allowed to recover, with regard

¹⁸ 47 U.S.C. § 271(c)(2)(B)(i), (ii), (xiii) and (xiv).

¹⁹ *Id.* § 252(d)(1).

²⁰ *Ameritech Michigan Order*, ¶289.

²¹ *Id.* ¶ 290.

²² *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies...*, Louisiana PSC Docket No. U-22022, *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s Tariff...*, Louisiana PSC Docket No. U-22093, *Final Recommendation*, at 18 (Oct. 17, 1997) (hereinafter, "*ALJ Recommendation*").

to ULLs, a "Residential Recovery Requirement," described by BellSouth as the *difference* between the TELRIC cost of a ULL and the price needed to recover all of its embedded investment in the loop.²³ Similarly, BellSouth advocated a costing methodology which relied upon BellSouth's existing network to estimate forward looking costs,²⁴ in direct contravention of FCC findings that such an approach is tantamount to an embedded cost methodology, as the resulting prices would reflect inefficient or obsolete network design and technology.²⁵

BellSouth's objection to the use of TELRIC pricing principles naturally affected the inputs used to produce its cost study, and thereby poisoned the cost study results. BellSouth, for example, used actual utilization levels to ascribe a fill factor to feeder and distribution plant,²⁶ in opposition to the FCC's requirement that fill factors be based upon "a reasonable projection of actual total usage."²⁷ Similarly flawed inputs were utilized by BellSouth for cost of capital,²⁸ depreciation lives,²⁹ and allocation of shared and common costs.³⁰ Economist Dr. Marvin Kahn, sponsored by ACSI as an expert witness in the Louisiana cost

²³ *Id.*

²⁴ *Id.*

²⁵ *Local Competition Order*, ¶¶ 683-685.

²⁶ *ALJ Recommendation* at 46-47.

²⁷ *Local Competition Order*, ¶ 682.

²⁸ *See ALJ Recommendation*, at 26-31.

²⁹ *Id.* at 33-39.

³⁰ *Id.* at 40-43.

docket, estimated that these erroneous inputs caused BellSouth to overstate the TELRIC cost of a 2-wire ULL by approximately \$7.70, or 56 percent.³¹

Although the Chief Administrative Law Judge ("ALJ") attempted to correct for some of these errors,³² the Louisiana PSC ("LPSC") rejected her Final Recommendation.³³ While the LPSC described its permanent rates as "cost-based," saying it does not make it so. The LPSC-approved UNE rates relied in large part on the flawed BellSouth definition of "cost-based," adjusted somewhat to reflect the LPSC consultant's definition of "cost-based," but are in no way consistent with the TELRIC pricing principles required by the FCC for purposes of satisfaction of the Section 271 competitive checklist. The disappointing consequence is that the \$19.35 permanent ULL rate approved by the LPSC far exceeds the cost-based rate of \$13.67 calculated by ACSI's expert, and is higher even than the \$16.98 state proxy *ceiling* rate previously established by the FCC.³⁴ Permitting BellSouth to begin providing interLATA services in Louisiana, while it charges CLECs non-TELRIC-based UNE rates, would hamstring the development of local competition in the state. As the Commission has observed, "allowing a BOC into the in-region interLATA market in one of

³¹ See *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies...*, Louisiana PSC Docket No. U-22022, *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s Tariff...*, Louisiana PSC Docket No. U-22093, *Post-Hearing Brief of ACSI*, at 24 (Sept. 29, 1997) (hereinafter, "*ACSI Brief*").

³² See generally, *ALJ Recommendation*.

³³ *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies...*, Louisiana PSC Docket No. U-22022, *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s Tariff...*, Louisiana PSC Docket No. U-22093, *Order No. U-22022/22093-A*, at 5 (Oct. 24, 1997) (hereinafter, "*LPSC Cost Order*").

³⁴ *Local Competition Order*, Appendix D.

its states when that BOC is charging noncompetitive prices for interconnection or [UNEs] in that state could give that BOC an unfair advantage in the provision of long distance or bundled services."³⁵

B. BellSouth Refuses Offer Geographically-Deaveraged UNE Rates in Accordance with the FCC's Roadmap

The Commission has stated that establishing prices based on TELRIC is a "necessary, but not sufficient, condition for checklist compliance."³⁶ To satisfy Section 271, UNE rates "must also be geographically deaveraged to account for the different costs of building and maintaining networks in different geographic areas of varying population density,"³⁷ since deaveraged rates "more closely reflect the costs" of providing UNEs.³⁸ Interestingly, the ALJ agreed, finding that the "implementation of geographic de-averaging is necessary for the determination of accurate costs," and recommended that the LPSC "reject the use of statewide average rates. . . in favor of geographically de-averaged rates."³⁹ Unfortunately, BellSouth ignored the FCC's roadmap, and the LPSC rejected its ALJ's recommendation. The LPSC adopted statewide averaged rates which enable BellSouth to require ACSI to fund its statewide network costs in Louisiana, despite the fact that ACSI's current operations are

³⁵ *Ameritech Michigan Order*, ¶ 287.

³⁶ *Id.* ¶ 292.

³⁷ *Id.*

³⁸ *Id.* According to the Commission, [d]eaveraging should, therefore, lead to increased competition and ensure that competitors make efficient entry decisions about whether they will sue [UNEs] or build facilities." *Id.*

³⁹ *ALJ Recommendation*, at 26.

restricted to several metropolitan areas.⁴⁰ This failure to deaverage UNE rates greatly exacerbates the anticompetitive effect of adopting the non-cost-based UNE rates discussed in the preceding section. BellSouth is able to quote end user prices in downtown New Orleans, for example, based on its low cost to serve customers there, while ACSI must incorporate BellSouth's much higher statewide average loop costs in its own pricing models. By this means, BellSouth — and the LPSC — have conferred an inherent competitive advantage upon the incumbent.

C. BellSouth's Non-Recurring Costs Create a Barrier to Entry

The problem of already overstated BellSouth UNE costs in Louisiana is made far worse by the fact that the associated non-recurring ("NRC") charges are grossly inflated. BellSouth's NRC costs were based on unreasonable assumptions, such as its contention that 20 percent of all OSS orders will be problematic and require manual intervention.⁴¹ Worse yet, BellSouth's NRCs are structured to extract a premium simply to satisfy normal expectations for provisioning quality. If, for example, BellSouth is asked to adhere to the terms of its interconnection agreement with ACSI and convert ULLs within a specified 30 minute window, the LPSC has authorized it to collect a \$32.77 NRC. Worse yet, BellSouth was authorized to collect an additional \$43.67 if it coordinates orders to ensure that a customer's service is not disrupted for more than 15 minutes (the ACSI interconnection agreement requires 5 minutes). Just as shocking, the LPSC approved BellSouth's proposal to

⁴⁰ See *LPSC Cost Order*, at 3-5.

⁴¹ *ALJ Recommendation*, at 43.

collect hefty NRCs for *disconnection* from CLECs at the time of connection rather than at the time of disconnection.⁴²

The ALJ rightly concluded that BellSouth's proposal for NRCs was not "in accordance with the cost causation principle of TELRIC analysis."⁴³ Yet, despite the LPSC consultant's admission that, due to a lack of time, she was required to simply accept BellSouth numbers with respect to OSS and other non-recurring charges,⁴⁴ the LPSC adopted her proposed NRCs without change.⁴⁵ The result is a set of non-cost-based NRCs that have been set so high as to constitute a barrier to entry.

Added together, the LPSC-approved NRCs required to install a single 2-wire analog ULL amount to \$170.83.⁴⁶ This compares to a total NRCs charged by BellSouth to end users to establish service of approximately \$85.00 per line.⁴⁷ As market experience in the interexchange business has shown, customer churn rates increase rapidly as competition

⁴² *Id.*

⁴³ *See, id.* at 46.

⁴⁴ *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies...*, Louisiana PSC Docket No. U-22022, *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s Tariff...*, Louisiana PSC Docket No. U-22093, *Transcript*, at 3110 and 3121.

⁴⁵ *See LPSC Cost Order*, at 3-5.

⁴⁶ *ACSI Brief*, at 14.

⁴⁷ The total NRCs figure assumes the following: 2 wire ULL (\$52.17); OSS charge (\$9.16); order coordination for a specified conversion time -- 30 minute window (\$32.77); manual order coordination -- 15 minute disruption on cutover (\$43.67); cross-connect charge (\$32.52); number portability (\$0.54). The NRCs stated above include both the related connection and disconnection charges.

intensifies. Thus, CLECs must recoup these NRC costs over a relatively short period, and such inflated NRC costs substantially inflate their own end user rates.

It also is important to observe that BellSouth's sky-high NRCs for ULLs is likely to deter consumers from experimenting with alternative LECs. There can be little doubt that the low PIC change charge (typically \$5.00) assessed by LECs to change IXC has caused consumers to select freely and frequently between competing IXC service offerings. Common sense dictates that the same propensity of consumers to "vote with their feet" will not manifest itself when non-cost based conversion charges of over \$170 per line apply. Thus, BellSouth's non-cost-based NRCs are anticompetitive to the extreme, and seem intended to have the effect of locking-in BellSouth's current exchange service customers.

D. BellSouth's Creation of a Residential Cost-Price Squeeze Is Forestalling the Development of Facilities-Based Residential Service Competition

ACSI must purchase ULLs and related facilities from BellSouth to provide facilities-based local exchange services to individual residential customers. While ACSI is able to replace BellSouth's interoffice transport facilities, tandem switching, local switching and signaling over time, there currently is no economic substitute for the ubiquitous local loop constructed by BellSouth with a century-long monopoly revenue stream. The out-of-pocket cost to ACSI of purchasing ULLs from BellSouth constitutes direct cost of service to ACSI. In order to provide residential services profitably, ACSI must be able to recoup both the cost of purchasing ULLs from BellSouth and the cost of its own network and overhead in its retail pricing for residential services. At the same time, the market demands that ACSI's

retail prices charged to end-users be established at or below the rates charged by BellSouth to end-users for comparable services.⁴⁸

Unfortunately, BellSouth currently demands a price for ULLs and associated facilities that exceeds the corresponding price charge by BellSouth for residential retail local exchange services. Specifically, in order to serve a residential customer, ACSI currently must pay BellSouth \$19.35 monthly for a 2-wire loop, plus \$0.26 for the cross-connect and \$2.29 for number portability. *ACSI's per-line out-of-pocket cost to BellSouth is \$21.90, even before ACSI pays for collocation and its own network and overhead.* When the need to recover NRCs associated with ULLs is taken into account, ACSI's effective monthly out-of-pocket cost per 2-wire loop increases to \$26.57.⁴⁹ By contrast, *BellSouth's retail price for basic residential service in New Orleans, Shreveport and Baton Rouge is only \$13.55, \$13.45 and \$13.55, respectively.*⁵⁰ Since ACSI must purchase ULLs from BellSouth at a cost that alone exceeds BellSouth's residential retail rates, neither ACSI nor any other CLEC currently is able to provide residential service in Louisiana profitably. Consequently, BellSouth's current

⁴⁸ See *In re: Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271*... Louisiana PSC Docket No. U-22252, *Testimony of Riley M. Murphy*, at 7-9 (Apr. 7, 1997) (hereinafter, "*Murphy Testimony*").

⁴⁹ The applicable interim non-recurring charges total \$170.83 per ULL combined. Assuming that customers churn on average every two years, this raises the effective monthly ULL cost to \$26.57 [(\$170.83 NRC divided by 24) + \$19.45].

⁵⁰ *Murphy Testimony*, at 8.